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674680—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 731

MARION LEE (BILL) IVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 44–49;[1] Pet. App. 1–5) is reported at 310 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1962 (R. 50). On December 9, 1962, the Chief Justice extended the time for the filing of a petition for a writ of certiorari to and including January 9, 1963. The petition was filed on January 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] R. 1 consists of the typewritten appendix to the brief of appellant below and is separately paginated 1 to 26. References to pp. 1-26 herein are not to this appendix but to the record pagination which follows the typewritten appendix.

QUESTION PRESENTED

Whether the instructions to the jury were insufficient because not rephrased as requested by petitioner.

STATUTES INVOLVED

Internal Revenue Code of 1954, as amended by Pub. L. 85–859, Title II, Sec. 201, 72 Stat. 1398 (26 U.S.C. 5601):

> (a) *Offenses.*
>
> Any person who—
>
> (1) *Unregistered stills.*—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) * * *
>
> * * * * * *
>
> shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.
>
> (b) *Presumptions.*—
>
> (1) *Unregistered stills.*—whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).
>
> * * * * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of North Carolina on four counts charging the following liquor violations: (1) possession, custody, and control of an unregistered still; (2) working at a distillery at which the required sign had not been posted; (3) making or fermenting 4,000 gallons of mash fit for distillation; and (4) removing, depositing, or concealing 41 gallons of whiskey on which no tax had been paid (R. 4–5).

At the trial, officers testified for the government that they observed petitioner at the site of the still (located 200 yards from petitioner's residence, R. 16), caulking cracks in the condenser box (R. 13); that petitioner fled when the officers approached and called him (R. 14–15); and that, when apprehended, he declined to offer any explanation (R. 15). The defense presented no evidence at the trial (R. 46).

The trial judge instructed the jury on the presumption of innocence and the necessity that the government prove guilt beyond a reasonable doubt, saying, *inter alia:*

> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the United States to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof.
>
> A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

> The law does not impose upon the defendant the duty of producing any evidence [R. 11–12].

With respect to the requirement, under the first count, that the government prove petitioner's possession, custody, or control of an unlawful still, the court said, *inter alia:*

> A person who although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing is then in constructive possession of it. [R. 19]
>
> * * * * *
>
> If you find from the evidence beyond a reasonable doubt that the defendant Marion Lee Ivey, either alone or jointly with others, had actual or constructive possession on the 11th day of September, 1961, of the still set up described in the first count of the indictment, then you may find that such still set up was in the possession of the defendant Marion Lee Ivey within the meaning of the word possession as used in these instructions.
>
> If you find from the evidence beyond a reasonable doubt that the defendant was at the site or place where and at the time when the still or distillery apparatus described in the indictment was located, such presence of the defendant is sufficient evidence for you to convict the defendant unless the defendant explains such presence to your satisfaction [R. 19].

In discussing the remaining three counts, the court omitted any reference to the permissibility of inferring guilt from petitioner's presence at the still. He instructed the jury that it might find the defendant guilty or not guilty as to each count under which he

was charged. Counsel for petitioner objected as follows to the instruction under Count 1 (R. 25–26):

> The defendant, Marion Lee Ivey, excepts to that portion of the charge which reads that a defendant by his mere presence at a distillery is presumed to have custody and control, ownership, et cetera. And the further qualification that that standing unexplained without clearly indicating what unexplained means in that particular instance imposes too severe a burden on the defendant, particularly if that language is not followed by advising the jury that although there is this presumption, which the defendant again believes is erroneous, that it should be followed by advising the jury that this does not vitiate the presumption of innocence that follows any defendant throughout the trial of his case, that it is too severe an interpretation of the Statute or law or what it may be to say that the mere presence of one at a still, without saying how it can be explained or what explained may be, is too severe, especially if not followed by advising the jury at that particular juncture that that section of the instructions given or part of the charge is given, that this does not nullify the presumption of innocence and that they should not presume from the mere presence that the defendant is guilty as charged because he was seen at or near the still.

The court overruled this objection (R. 26). Upon the jury's verdict of guilty on all counts, the court imposed concurrent sentences of three years on Counts 1 and 3 and concurrent sentences of one year and two years, respectively, on Counts 2 and 4, to commence at the end of the three-year sentences. However, the

sentences on Counts 2 and 4 were suspended and petitioner placed on five years' probation (R. 6).

ARGUMENT

1. Since petitioner's sentence of three years on the challenged conviction under Count 1 runs concurrently with the sentence on the unchallenged conviction under Count 3, the judgment is sustainable upon Count 3 alone. *Claassen* v. *United States*, 142 U.S. 140, 146–147; *Evans* v. *United States*, 153 U.S. 608, 609; *Pierce* v. *United States*, 252 U.S. 239, 252; *Brooks* v. *United States*, 267 U.S. 432, 441; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Lawn* v. *United States*, 355 U.S. 339, 359.

2. In any event, petitioner's objection to the instruction on Count 1 is without merit. He does not in this Court contest the validity of Section 5601 (b)(1), which provides that the presence of a defendant at the site of an unregistered still, unless explained, will permit the jury to convict him of illegally possessing the still (Pet. 8, 17). Rather, the gravamen of his complaint is that the trial judge refused to repeat at the end of the charge the instruction given at the outset with respect to the presumption of innocence. He contends that the trial court should have told the jury in so many words that it was *permitted* to draw an inference of guilt from the fact of petitioner's presence at the still but was not *required* to do so; and that, despite such presence, the govern-

ment still had the burden of proving guilt beyond a reasonable doubt.

It is clear, however, that while the judge did not use the precise phraseology requested by petitioner, his instruction—couched in the language of the statute—adequately conveyed the same substance. It charged that petitioner's presence at the still would be "sufficient" evidence to "authorize" conviction unless explained to the jury's satisfaction (R. 18). Later in the instruction (in a portion not quoted in petitioner's brief (Pet. 4–5)), the court adverted three times to the necessity that the government prove its case beyond a "reasonable doubt" (R. 19–20) and again described the evidence of presence at the still merely as "sufficient," not conclusive (R. 19). These admonitions, we submit, together with the initial instruction as to the presumption of innocence, adequately apprised the jury of the proper legal standard. The failure of the judge to amplify the charge in the manner requested was not error, much less reversible error.

We would point out, moreover, that in this case the Government's unrebutted evidence went beyond the minimum which the statute deems sufficient to warrant conviction. The testimony disclosed that petitioner was not only present at the still, but was actually working on it; that he fled at the approach of the officers; and that, when apprehended, he offered no explanation whatever. Under these circumstances, it is difficult to see how the jury could have reached any verdict other than the one it did.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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